No. 99-689 (4)

In The
Supreme Court of the United States
October Term, 1999

TERRY STEWART, Director, Arizona Department of Corrections,
and MEG SAVAGE, Warden, Arizona State Prison - Florence Complex,
Petitioners,

v.

JAMES GRANVIL WALLACE,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Where Respondent's background may have legitimate bearing on his mental state at the time of the capital offense, and hence on the existence of statutory and non-statutory mitigating factors, and where counsel failed to conduct any investigation of relevant and readily available facts from Respondent's background, did the Court of Appeals err in remanding the case for an evidentiary hearing on whether counsel's omissions constituted ineffective assistance of counsel?

2. Does the opinion of the Court of Appeals conflict with this Court's decision in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), on the issue of whether an evidentiary hearing should be held in federal court when Respondent has alleged facts in state court that, if true, entitled him to relief, but where the state court denied Respondent the opportunity to develop and present the claim by denying Respondent's request for investigative funds, expert assistance and an evidentiary hearing?

PARTIES TO THE PROCEEDING BELOW

The Petitioners Stewart and Savage are, respectively, the head of the Arizona State Department of Corrections as the Warden of the Arizona State Prison Complex at Florence. The Respondent Wallace is a prisoner in that system.

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OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals (Kozinski, J.) is reported at 184 F.3d 1112 (9th Cir. 1999), and is also contained as the Appendix A to the Petition here, as is the order of the district court, Appendix B.

STATEMENT OF JURISDICTION

The order of the district court denying habeas corpus relief was entered on January 24, 1997. The order of the Court of Appeals directing an evidentiary hearing on the issue of the effectiveness of counsel at sentencing was entered July 21, 1999. The Petition for Certiorari was filed on October 19, 1999. This Court has jurisdiction under 27 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The relevant passage of the Sixth Amendment of the Constitution of the United States is that "in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." All agree that the lead discussion of this clause is found in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

STATEMENT OF THE CASE

Petitioner's statement of facts is both incomplete and inaccurate.[1] For that reason, we repeat here the relevant facts from the Court of Appeals decision below, for the Court's convenience:

> Petitioner, James Granvil Wallace, pleaded guilty to first degree murder and was sentenced to death. The circumstances of the crime are brutal and undisputed. .... Wallace has reported what he remembers of the murders and has never denied he was the perpetrator. Indeed, he insisted on pleading guilty in order to spare the victim's family the anguish of a trial.
>
> Nothing in the record explains Wallace's violent actions. The senselessness of the tragedy is underscored by the fact that the rational mind can find nothing that Wallace gained by destroying Susan Insalaco and her children. The bizarre circumstances of the crime suggest that Wallace may have been acting as a result of some mental infirmity, which might have constituted a mitigating circumstance under Arizona's death penalty sentencing scheme. Nevertheless, Wallace was sentenced to death for his crimes, and his principal claim in his federal habeas petition is that his counsel were ineffective in presenting the available mitigating evidence to the sentencing court....
>
> * * *
>
> Because Wallace admitted committing the murders and pleaded guilty, the only question left for trial was Wallace's sentencing. Exploring the defendant's mental state and other

[1] For example, contrary to Petitioners' statement of facts, Pet. at 5, Respondent did not insist on receiving the death penalty.

potential mitigating factors was clearly a central task for his counsel. Yet Wallace's lawyers devoted remarkably little time to this task. [footnote omitted]. Of the 45.9 hours Couser spent on Wallace's case, he spent 36 minutes conferring with Dr. Bendheim, and only 1.4 additional hours talking to other prospective witnesses for the sentencing hearing. He did not provide Bendheim with the MMPI results and he did not investigate what Drs. Little and Morenz referred to as Wallace's "very chaotic childhood." This information was easily within his reach: Wallace's three sisters have since signed affidavits saying they would have willingly provided information about Wallace's childhood and testified on his behalf, yet Couser never contacted them.

Curtis spent 45.25 hours preparing for Wallace's resentencing, including only about an hour interviewing witnesses. In his own words, he "conducted no factual investigation concerning ... potential mitigation [ ] or the appropriateness of the death penalty." [citation omitted].

Had they only looked, Couser and Curtis would have discovered a great deal about Wallace's family history, which Dr. Bendheim now describes as "one of the most dysfunctional family environments I have ever encountered." Wallace's mother was in and out of mental hospitals, diagnosed as psychotic, alcoholic and anorexic, among other things. On one occasion, she stabbed her husband in the head with a butcher knife. On multiple occasions, she tried to kill herself. She would disappear for weeks, and her children eventually would find her hidden naked somewhere in the house. On one particularly bizarre occasion, she resurfaced underneath Wallace's bed, naked and kicking so hard the bed bounced up and down. Wallace woke up the household with his screams. Wallace's father, a severe alcoholic, once "cold-cocked" his wife in front of Wallace and "stomped" repeatedly on her neck. Wallace himself sniffed glue and gasoline daily between the ages of ten and twelve, and experienced a "clinically significant series of head traumas" while growing up. Dr. David Lisak, who examined Wallace in 1993, concluded that "[t]he family and home in which Jim

> Wallace was raised was marred by an almost unimaginable level of chaos, neglect, bizarre and insane behavior, and by extreme violence between the parents."
>
> The sentencing judge saw only glimmers of this history, and received no evidence about its significance vis-a-vis mitigating circumstances.

Wallace v. Stewart, 184 F.3d 1112, 1113-1116 (9th Cir. 1999).

Based on these facts and others set forth in the opinion below, Respondent filed a petition for writ of habeas corpus in the district court in 1991, raising, among other claims, that he was denied the effective assistance of counsel at his capital sentencing hearing.[2] The District Court summarily dismissed the petition, and denied Respondent all relief, including his motions for discovery and an evidentiary hearing.

Judge Kozinski, writing for a unanimous panel of the Court of Appeals reversed the District Court's decision denying an evidentiary hearing on Respondent's claim of ineffective assistance of counsel at sentencing. The panel found that Respondent had made out a prima facie case that his lawyers were "less than competent at sentencing." *Wallace v. Stewart*, 184 F.3d at 1118.

> [W]ere the district court to accept all of [Respondent's] evidence, it could find that [Respondent's] lawyers were ineffective, and conclude that there is a reasonable probability that the death sentence would not have been imposed had they been effective.

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[2] This case was pending before the 1996 enactment of the Antiterrorism and Effective Death Penalty Act, and thus, is not governed by those amendments. See *Lindh v. Murphy*, 117 S. Ct. 2059 (1997).

Id. For that reason, the panel properly remanded the case to the district court for an evidentiary hearing as to whether counsel was ineffective, and if so, whether Respondent was prejudiced. *Id.*

REASONS FOR DENYING THE PETITION

Nothing in the opinion below warrants this Court's certiorari review. It is not a decision on an issue of federal law that conflicts with a decision of another federal or state court. It is not a decision that incorrectly applies the law. It is instead a decision based on a careful and thorough review of the facts and evidence presented in the state and federal proceedings in this case, and a reasonable application of those facts to the settled law. In finding that Respondent had alleged facts that, if true, entitle him to relief on his claim of ineffective assistance of counsel, the Court of Appeals directed an evidentiary hearing on that claim. It is this order that is the subject of this Petition.

There is nothing final about the Court of Appeal's remand; it found only that were the district court to accept all of Respondent's evidence, it could find that Respondent's lawyers were ineffective. For these reasons, this Court should deny certiorari. *See United States v. Johnston*, 268 U.S. 220, 227 (1925)("We do not grant a certiorari to review evidence and discuss specific facts").

I. THE COURT OF APPEALS PROPERLY APPLIED STRICKLAND TO THE FACTS OF THIS CASE AND REMANDED FOR AN EVIDENTIARY HEARING ON THE INEFFECTIVENESS OF TRIAL COUNSEL.

Petitioners contend that, in remanding for an evidentiary hearing on the claim of ineffective assistance of counsel, the Court of Appeals did not apply the proper standard under *Strickland v. Washington*, 466 U.S. 668 (1984) and that its decision conflicts with decisions of other circuit courts. Petitioners are wrong on both counts.

A. Strickland Was Properly Applied By The Court Of Appeals.

Nothing in the Court of Appeals opinion conflicts with *Strickland.* The Court below properly applied the facts to the settled law of *Strickland* and concluded that if the facts as alleged in Respondent's affidavits are true, the federal court could find that Respondent was denied the effective assistance of counsel at his capital sentencing hearing. *Wallace v. Stewart*, 184 F.3d at 1118.

The essence of the State's argument here is that it is not up to counsel to investigate background facts about a person facing a capital sentencing; it is up to the expert. If, for example, the expert does not ask for facts about the bizarre behavior of Respondent's mother, or of Respondent's drug and alcohol use beginning in pre-adolescence, or of his corrosively dysfunctional family environment, counsel has no duty to learn them.

Strickland does not support the State's argument. *Strickland* holds that the standard of competence for a capital sentencing case is the same as that for an ordinary

trial. This means that counsel must make reasonable investigations. 466 U.S. at 691. Thus, "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances..." *Id.* Here, the Court of Appeals, on close analysis of the record and with specific reference to the facts, concluded that counsel had not performed that function. Although "[t]his information was easily within ... reach," neither counsel ever spoke to or contacted any member of Respondent's family or gathered any records of any kind about Respondent or his family. *Wallace v. Stewart*, 184 F.3d at 1116.

Even in the face of this evidence, however, none of which was contradicted by the State, the Court of Appeals did not preordain any result; it merely remanded for an evidentiary hearing to allow the state "an opportunity to cross-examine [Respondent's] affiants, or to present evidence of its own." *Id.*, 184 F.3d at 1118.

This decision in no way "alters" the second – "deficient performance" – prong of *Strickland*, as the State claims. Rather, the Court of Appeals looked at counsels' performance at the time of their representation of Respondent, and concluded, unsurprisingly, that the circumstances did indeed require counsel to investigate Respondent's background. The need to conduct a reasonable investigation for the penalty phase of a capital case is not a novel concept and is unequivocally consistent with *Strickland*, as numerous courts have repeatedly held. *See e.g., Thomas v. Kemp*, 796 F.2d 1322, 1324 (11th Cir.), *cert. denied*, 479 U.S. 996 (1986) (counsel ineffective where little

effort made to investigate possible sources of mitigation evidence, including no attempt to obtain possible mitigation testimony from other family members or individuals who knew defendant).

Next, and contrary to the State's baseless and somewhat furtive claim, the Court of Appeals' decision, does not require counsel to "possess a heightened level of expertise in the sentencing phase." Pet. at 11. It merely acknowledges the unremarkable principle that the scope and range of relevant evidence at the sentencing phase of a capital case is different, and broader, than that necessary to determine the mental state of a defendant at the guilt/innocence phase. *Wallace v. Stewart*, 184 F.3d at 1117 n.5. That is because the central issue at the guilt/innocence phase is establishing whether the necessary elements of the crime have been proven beyond a reasonable doubt. At punishment, the factfinder is not so limited, but must consider, as a matter of Eighth Amendment law, a "myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, 463 U.S. 992, 1007-08 (1983). *See also Barclay v. Florida*, 463 U.S. 939, 950 (1983) ("moral, factual, and legal judgments ... play a meaningful role in sentencing"); *Williams v. New York*, 337 U.S. 241, 247 (1949) (contrasting "narrow issue of guilt" to sentence based on "fullest information possible"). As this Court explained:

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged

> background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."

Penry v. Lynaugh, 492 U.S. 302, 319 (1989), *quoting California v. Brown*, 479 U.S. 538, 545(1987)(O'Connor, J., concurring). *See also Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982)(holding that evidence of serious emotional problems in a young defendant "does not suggest an absence of responsibility for the crime of murder," but it may have great mitigating weight at sentencing).

B. No Conflict In The Circuits Exists.

The Court of Appeals opinion also does not conflict with decisions from other courts, state or federal. The two cases Petitioner cites for the purported conflict not only show no such conflict, but in fact support the decision of the court below.

In *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990), the circuit court held that counsel was not ineffective at sentencing where his testifying mental health expert had at least the following information relating to Card's mental health:

> (1) a report from a psychologist, finding the defendant competent to stand trial, sane at the time of the offense and appeared to have known the difference between right and wrong;
>
> (2) a report from a psychologist, after a four hour evaluation, detailing the results of psychological tests, concluding that the defendant suffered personality and behavior problems, and agreeing that he was competent to stand trial , not insane, and knew the difference between right and wrong;
>
> (3) two reports from another mental health expert finding the defendant competent to stand trial, "detailing aspects of his

> background, including his criminal record, violence, and infliction of self injury;"
>
> (4) an oral report from a mental health expert concerning his interview with the defendant's parents and other information ; and
>
> (5) the testifying mental heath expert's own examination of the defendant, results of tests administered and his own conversation with family members.

Id., 911 F.2d at 1512. Based on these facts, the Circuit Court concluded that trial counsel was not ineffective in failing to gather other records and providing the experts more detailed information from family members, and also noted that "it is unclear that, even had these materials been provided to experts, their evaluations of [the defendant] would have differed." *Id.*

No such facts exist here. Neither Respondent's sentencing counsel, nor any mental health expert, ever gathered any records concerning Respondent, or spoke with any member of his family. The only information Dr. Bendheim had when he testified at the capital sentencing hearing came from a brief interview with Respondent and the presentence report that he perused while waiting to testify.[3] The only information Dr. Gurland had when he testified at the resentencing on one of the convictions was Dr. Bendheim's previous testimony and some police reports.

[3] Trial counsel spent only half an hour conferring with Dr. Bendheim .

In addition, all the testifying experts, both from the defense and the state, have said that the information obtained from the investigation into Respondent's background is not only relevant and material, but would have significantly impacted their testimony and conclusions. For example, the State's expert, Dr. Morenz now concludes that Respondent suffers from multiple mental disorders, and at the time of the murders, his capacity to conform his conduct to the requirements of the law was significantly impaired.

As discussed above, the ruling of the Court of Appeals not only tracks the law of the Eleventh Circuit, but of other circuits as well. *See, e.g., Baxter v. Thomas*, 45 F.3d 1501, 1513 (11th Cir.), *cert. denied*, 516 U.S. 946 (1995) (defendant prejudiced from counsel's failure to conduct reasonable investigation into defendant's background for the penalty phase); *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) (counsel ineffective where he had "small amount of information regarding possible mitigating circumstances regarding [petitioner's] history, but ... inexplicably failed to follow up with further interviews and investigation"); *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988) (resentencing required where trial counsel did not introduce evidence of defendant's background at sentencing and lack of investigation resulted in the failure to uncover "an overwhelming amount of documentary mitigating evidence"); *Stephens v. Kemp*, 846 F.2d 642 (11th Cir.), *cert. denied*, 488 U.S. 872 (1988)(counsel's performance deficient where counsel failed to investigate defendant's mental history and conditions

despite his knowledge that defendant had spent time in a mental hospital, and failed to explain relevance of mitigation, elicited by trial judge, from testimony of defendant's mother); *Antwine v. Delo*, 54 F.3d 1357, 1368 (8th Cir. 1995), *cert. denied, sub nom, Bowersox v. Antwine*, 116 S. Ct. 753 (1996) (counsel ineffective for failing to effectively present evidence of petitioner's mental impairment at penalty phase of capital trial); *Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1990) (counsel ineffective at capital sentencing for failing to fully investigate defendant's family and mental history); *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), *cert. denied*, 117 S. Ct. 273 (1996) (counsel ineffective at sentencing for failing to develop and present evidence regarding petitioner's difficulties in school, brain damage and that he was a follower).[4] Rather than being anomalous, the Court of Appeals' ruling marches lockstep with other circuits in applying *Strickland.*

The only other case Petitioners cite for a purported conflict on this point, *Smith v. Dixon*, 766 F. Supp. 1370 (E.D.N.C. 1991), *aff'd*, 966 F.2d 667, 679 (4th Cir. 1994), *vacated on other grounds*, 14 F.3d 956 (1994), also offers no support. There, the district

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[4] Petitioners also refer in a parenthetical to the Eleventh Circuit's decision in *Hill v. Moore*, 175 F.3d 915, 926 (11th Cir. 1999), as apparent support for a "conflict" with the Court of Appeals decision. There the circuit court concluded that counsel was not ineffective in failing to present evidence of childhood neglect where "[t]he extent of his proffer in this regard is that his mother often gave him 'good whippings'" *Id.* It also concluded that "[g]iven the time the court-appointed psychologist invested in his evaluation of petitioner, information, if it existed, about the defendant's background could have been discovered. No such slight or speculative facts are present here. The facts counsel failed to investigate and present here are material and certain, and the resulting prejudice to Respondent, is known.

court concluded that trial counsel were not ineffective at sentencing where the allegations made against them proved untrue. Although post-conviction counsel claimed that trial counsel were ineffective for failing to obtain certain records and conduct certain tests, the records in fact were obtained and the tests were in fact conducted. In addition, the testimony of the two experts at sentencing showed that they, too, were in fact properly prepared, and the jury's finding of the emotional disturbance factor demonstrates the effectiveness of the psychiatric testimony.

Here, in stark contrast, no background records on Respondent were gathered by counsel, or any expert, and, other than an MMPI, the results of which were not disclosed to either Dr. Bendheim or Dr. Gurland, no testing of any kind was conducted. Not unexpectedly, given the absence of information, the factfinder here, unlike in *Smith v. Dixon*, found no mitigating evidence concerning Respondent's mental state at the time of the crime or of his extremely dysfunctional background.

In short, the Court of Appeals decision that the duty to investigate background facts that bear on mental conditions, where this may be an issue, is squarely upon counsel – a ruling reaffirmed by repeated decisions, not only by the Eleventh and Fourth Circuits, but by many others circuit courts as well. "An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence," *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir.1994), and

"[t]he failure to do so may render counsel's assistance ineffective." *Baxter v. Thomas*, 45 F.3d at 1513 (quotation and citation omitted).

II. THE COURT OF APPEALS OPINION BELOW DOES NOT CONFLICT WITH *TAMAYO-REYES.*

Petitioners' second contention is that the Court of Appeals erred in holding, contrary to *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), that the state-induced failure of Respondent to present in state post-conviction proceedings all of the evidence he was subsequently able to gather and present in federal court, prohibited him from presenting this evidence in federal court and prohibited the district court from considering this evidence. This argument is ludicrous.

Applying the precepts of *Tamayo-Reyes*, the Court of Appeals meticulously restricted the availability of an evidentiary hearing in federal court to cases in which petitioners raise a colorable claim and demonstrate (1) cause for not having fully developed the factual basis of that claim in state court and (2) prejudice.

The Court of Appeals below painstakingly considered and distinguished *Tamayo-Reyes.* As noted, Respondent had alleged in the state court a colorable claim that he was denied effective assistance of counsel at his capital sentencing, and it was there rejected on the merits – in spite of the fact that Respondent was given no opportunity to develop or present all the facts supporting his claim. Thus the Court of Appeals held that Respondent "fulfilled the cause prong of *Keeney* because he properly presented a colorable claim, and the state court denied him an evidentiary hearing." *Wallace v.*

Stewart, 184 F.3d at 1116, n.4. The Court of Appeals also held that the prejudice prong was satisfied because there was "a reasonable probability that the state courts would have granted him relief, had he been allowed to develop the evidence." *Id.*

Petitioners' position here willfully ignores two critical facts, both of which demonstrate the deficiencies of their argument. First, after alleging a colorable ineffectiveness of counsel at sentencing claim in state court, Respondent "moved for the appointment of an investigator, an evidentiary hearing and funds for mental health experts." *Id.* He supported his motions with affidavits from Dr. Bendheim, Dr. Gurland, and one of Respondent's sisters – all of which the Court of Appeals found to be compelling and which demonstrated a need for further investigation and expert assistance – as well as with records showing that no investigation of Respondent's background had ever been conducted by his prior counsel. In spite of this evidence, the state court denied Respondent's motions for an investigator and for mental health experts. The state court also denied Respondent's motion for an evidentiary hearing. *Id.* Thereafter, having denied Respondent the opportunity to develop all the facts supporting his claim, the state court denied the claim on the merits. *Id.* Thus, Respondent's attempts to present facts supporting his claim in state court were rebuffed by the state.

Second, and not surprisingly, none of the cases cited by Petitioners support their position that *Tamayo-Reyes* requires a habeas petitioner to present all the facts supporting his claim in state court – where the state court prevented him from doing so – before any

of that evidence can be considered by a federal court in determining whether an evidentiary hearing should be held. They don't because that argument is a reduction to the absurd.

Tamayo-Reyes presumes a failure to fully develop facts in state court – a point that is explicit in its holding. A petitioner is "entitled to an evidentiary hearing [in federal court] if he can show cause for his failure to develop the facts in state court proceedings and actual prejudice resulting from that failure." 504 U.S. at 11, 112 S. Ct. at 1721 (emphasis added). *See, e.g., Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir. 1997) ("Having tried and failed through no fault of his own to develop the facts relevant to his ineffective assistance claim at the state-court level in the only permissible manner, he clearly establishes the "cause" portion of the Keeney "cause and prejudice" test); *Spitzweiser-Wittgentstein v. Newton*, 978 F.2d 1195, 1196 (10th Cir. 1992) (evidentiary hearing warranted when failure to develop facts of petitioner's claim not attributable to inexcusable neglect). *Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998) (where petitioner sought a hearing in state court but was denied, federal evidentiary hearing not precluded because petitioner "diligently sought to develop the factual basis of a claim . . ."); *McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir. 1998) ("a petitioner cannot be said to have 'failed to develop' a factual basis for his claim unless the undeveloped record is a result of his own decision or omission"); *Love v. Morton*, 112 F.3d 131, 136 (3rd Cir.

1997) (petitioner did not fail to develop factual basis for claim where judge made it impossible for him to develop the record).[5]

After a thorough examination of the facts and record here, the Court of Appeals found that Respondent's failure to fully develop the factual basis of his claim in state court was not due to his own lack of effort. Rather, the Court of Appeals concluded that Respondent had shown both cause and prejudice. Under *Tamayo-Reyes*, therefore, he is entitled to an evidentiary hearing.

CONCLUSION

As the court below concluded, "To descend to the level of ineffective assistance of counsel, a lawyer's performance must be poor indeed.... Respondent has made out a *prima facie* case that [counsel] were less than competent at sentencing." The decision of the court below to remand this matter to the district court for hearing was fact intensive; reasonably meditated, accords with numerous other circuit decisions on the duties of counsel in capital sentencing cases, and need not be reviewed here. The Petition for a Writ of Certiorari should be denied.

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[5] As noted, this is a pre-Act case, and thus, § 2254(e)(2) does not apply here. Nonetheless, these cases, interpreting the amendment to this statutory provision as codifying *Keeney v. Tamayo-Reyes'* "inexcusable neglect" standard, are instructive.

RESPECTFULLY SUBMITTED this 22nd day of November, 1999.

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